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MICHAEL RODAK, JR.

In The

Supreme Court of the United States

October Term, 1974

No. 72-1713

SECRETARY OF THE NAVY,

Appellant,

v.

MARK AVRECH,

Appellee.

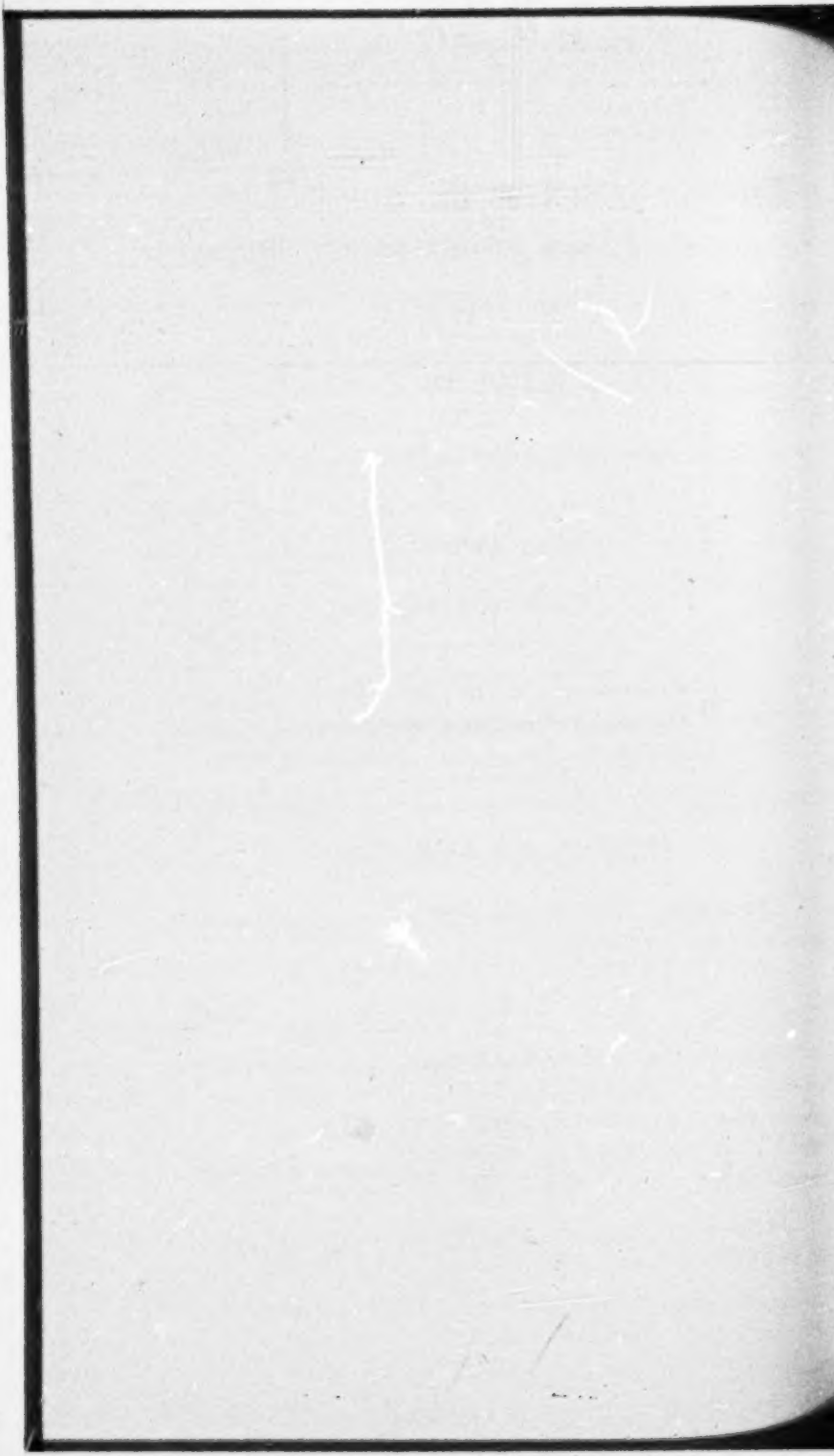
On Appeal From The United States
Court of Appeals For The District Of Columbia Circuit

PETITION FOR REHEARING

DORIAN BOWMAN
Rabinowitz, Boudin & Standard
30 East 42nd Street
New York, New York 10017

DAVID REIN
Forer & Rein
430 National Press Building
Washington, D.C. 20004

Attorneys for Appellee



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The appellee, Mark Avrech, petitions for rehearing for the reasons hereinafter stated.

I.

Assuming the correctness of the Court's opinion in *Parker v. Levy*, — U.S. —, 42 U.S.L.W. 4979 (June 18, 1974), that opinion does not justify the Court's statement in the instant case (slip op., p. 2) that that decision governs here and requires reversal of the Court of Appeals' decision below.

In *Parker v. Levy* this Court's holding was premised upon the fact that the Court of Military appeals had construed Article

134 as being limited to "calls for active opposition to the military policy of the United States" and did not reach all "disagreement with, or objection to, a policy of the government." Accordingly it upheld the conviction in that case because the Article was applied to conduct of a "commissioned officer [who was] publicly urging enlisted personnel to refuse to obey orders which might send them into combat." 42 U.S.L.W. 4987-4988. Appellee's attempted speech here has none of those characteristics. On the contrary:

1. Appellee was an enlisted man, not a commissioned officer.

2. Appellee did not, in any sense, urge anyone to disobey orders.

3. The statement appellee attempted to make can not be considered, under any construction, to be any more than a "disagreement with, or objection to, a policy of the government." *United States v. Harvey*, 19 U.S.C.M.A. 539, 544, 42 C.M.R. 100 (1971).

Since the Court in *Levy* upheld the validity of Article 134 on the ground that the Court of Military Appeals had construed the Article as not covering statements of the character made by the appellee here, there is absolutely no justification for the Court's statement in its *per curiam* opinion that the decision in *Levy* requires reversal of the Court of Appeals here. On the contrary, the logical implication of *Levy* is that the decision of the court below here should be upheld.

II.

We believe, in any event, that the Court's decision in this case requires clarification. In the court below, we advanced three separate grounds for reversing the appellee's conviction:

1. That Article 134 was invalid on vagueness and overbreadth grounds.

2. Assuming the validity of Article 134, that the specification under which the appellee was charged was invalid. See *Stolte v. Laird*, 353 F.Supp. 1392 (D.C.D.C. 1973).

3. That appellee's attempted speech was protected by the First Amendment.

Since the Court of Appeals decided the first issue in appellee's favor it expressed no views on the second and third grounds[1] raised by the appellee. Accordingly these questions still remain open and appellee should have an opportunity to have them resolved at some appellate judicial level. As matters now stand, the Court of Appeals has never considered these questions and neither has this Court.

We can assure the Court that we welcome the opportunity to argue these questions before the Court and at the same time fully brief and argue the jurisdictional issue in the case with undampened ardor. Alternatively, we request that this Court remand to the Court of Appeals with explicit directions to consider the questions left open.

III.

Finally, we believe that *Parker v. Levy*, *supra*, was wrongly decided. This Court upheld Article 134 of the Uniform Code of Military Justice, 10 U.S.C. §934, finding that although there were "sizable areas of uncertainty as to the coverage" of the Article there was, nevertheless, "a substantial range of conduct" to which the Article applied "without vagueness or imprecision." 42 U.S.L.W. at 4986. Accordingly this Court rejected the argument that Article 134 set forth "no standard of conduct,"

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1. Unlike the Court of Appeals for the Third Circuit which found, according to this Court, 42 U.S.L.W. at 4986, that Levy's conduct was covered by Article 134, the Court of Appeals here made no such finding with respect to the appellee's attempted statement.

Coates v. Cincinnati, 402 U.S. 611, 614 (1971) and held that the Article was not vague.

We submit that whatever may have been presented to the Court in the briefs in *Parker v. Levy*, the appellee's brief on the merits in the instant case and the discussion of Justice Clark in the Court of Appeals amply demonstrate that Article 134 is precisely that type of statute which specifies "no standard of conduct" and hence is vague. In finding otherwise the Court totally ignored the language of the Article (Appellee's Br., pp. 10-14), its English history (Appellee's Br., pp. 14-17) and its American legislative history (Appellee's Br., pp. 17-22).[2] Moreover the Court paid little attention to the fact that the military courts have not narrowed the broad reach of the Article (Appellee's Br., pp. 23-26, 47-49).

As stated by Justice Clark below, "Article 134 gives no fair warning of the conduct it proscribes and fails to provide any ascertainable standard of guilt to circumscribe the discretion of the enforcing authorities." 477 F.2d 1237, 1241. Thus contrary to this Court's view, Article 134 presents not merely a case where "difficulty is found in determining whether certain marginal offenses" fall within the Article's language, *United States v. National Dairy Corp.*, 372 U.S. 29, 32 (1963), but rather presents a case of traditional vagueness where a statute fails to proscribe *any* ascertainable standard of conduct at all.[3]

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2. *See*, e.g., the statement of General Crawder, the draftsman of the second clause of Article 134, to the effect that this clause ("all conduct of a nature to bring discredit upon the Armed Forces") was meant to include everything and was similar to the catch-net language of the tariff bills. Br., pp. 18-19.

3. In his concurring opinion in *Levy*, Justice Blackmun stated that Article 134 should be sustained because "times have not changed in the area of moral precepts" and that what is at issue here are "fundamental concepts of right and wrong." 42 U.S.L.W. at 4988. In essence the premise of this view is that Article 134 punishes conduct which is "wrong." We submit that this view should properly result in invalidating the Article for no statute whose references for determining criminality are unwritten "concepts of right and wrong" can pass any rational constitutional test for vagueness, regardless of the area to which the statute is applicable.

Accordingly, what this Court has done in *Parker v. Levy*, despite its rather broad marshalling of irrelevant factors,[4] is to say that so far as the military is concerned, the constitutional doctrine of due process of law has no application at all.

CONCLUSION

The petition for rehearing should be granted.

Respectfully submitted,

DORIAN BOWMAN
Rabinowitz, Boudin & Standard
30 East 42nd Street
New York, New York 10017

DAVID REIN
Forer & Rein
430 National Press Building
Washington, D.C. 20004

Attorneys for Appellee

Dated: July 30, 1974

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4. For example, the Court's statement that the Uniform Code of Military Justice permits the imposition under Article 15 of noncriminal sanctions, 42 U.S.L.W. at 4984, is no justification to uphold the validity of Article 134 when that Article has been applied, in the cases of both Levy and Avrech, to impose criminal sanctions.

CERTIFICATE

I certify that this petition for rehearing is presented i
good faith and not for delay.

DAVID REIN